

1 Robert L. Starr, Bar No. 183052  
robert@starrlaw.com  
2 THE LAW OFFICE OF ROBERT L. STARR, APC  
23901 Calabasas Road, Suite 2072  
3 Calabasas, California 91302  
4 Telephone: (818) 225-9040  
Facsimile: (818) 225-9042  
5

6 Stephen M. Harris, Bar No. 110626  
stephen@smh-legal.com  
7 THE LAW OFFICE OF STEPHEN M. HARRIS, APC  
6320 Canoga Avenue, Suite 1500  
8 Woodland Hills, California 91367  
Telephone: (818) 924-3103  
9 Facsimile: (818) 924-3079

10 Attorneys for Plaintiff  
11 KIEVA MYERS, individually, and on behalf of a class  
of similarly situated individuals  
12  
13

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION  
16

17 KIEVA MYERS, individually, and on behalf of a  
class of similarly situated individuals,

18 Plaintiff,

19 vs.

20 BMW OF NORTH AMERICA, LLC,

21 Defendants.  
22  
23  
24

CASE NO. 3:16-cv-00412-WHO

Assigned for All Purposes to  
the Honorable William H. Orrick

Date: 3-28-18  
Time 2:00 p.m.  
Courtroom: 2

**NOTICE OF MOTION AND MOTION  
FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on March 28, 2018 at 2:00 p.m., or as soon thereafter as  
3 the matter may be heard in Courtroom 2 of the above-entitled Court, 17<sup>th</sup> Floor, located at 450  
4 Golden Gate Avenue, San Francisco, California, Plaintiff Kieva Myers ("Plaintiff" or "Myers")  
5 will and hereby do move this Court to:

6 1. Preliminarily approve the Settlement Agreement and Release  
7 ("Agreement" or "Settlement"), attached as Exhibit 1 to the Declaration of Stephen M. Harris  
8 ("Harris Declaration").

9 2. Preliminarily approve the Notice, Claim Form, and Owners' Manual Insert attached  
10 as exhibits 2-4 to the Harris Declaration.

11 3. Permit the filing of Plaintiff's Third Amended Complaint for settlement purposes,  
12 attached as exhibit 5 to the Harris Declaration.

13 4. Conditionally certify, for settlement purposes only, a settlement class of all persons  
14 throughout the United States who currently own or lease or who previously owned or leased  
15 BMW NA 2007-2013 X5 vehicles, with a production date from October 1, 2006 through June 30,  
16 2013, which were distributed by defendant BMW of North America LLC ("BMW") and equipped  
17 with optional Comfort Access System, made for sale and/or lease in the U.S. market, and that  
18 were sold or leased to a Class Member who registered and operated the vehicle in the United  
19 States or Puerto Rico.

20 3. Appoint Plaintiff as the Class Representative.

21 4. Appoint Stephen M. Harris of the Law Offices of Stephen M. Harris, P.C., and  
22 Robert L. Starr of the Law Offices of Robert L. Starr, APC as Class Counsel.

23 5. Set a hearing date for final approval of the class action settlement.

24 This Motion is based upon: (1) this Notice of Motion and Motion; (2) the attached  
25 Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Class  
26 Action Settlement; (3) the Harris Declaration, and the exhibits attached thereto; (4) the [Proposed]  
27 Order Granting Preliminary Approval of Class Action Settlement, filed concurrently herewith; (5)  
28 the records, pleadings, and papers filed in this action; and (6) upon such other documentary and

1 oral evidence or argument as may be presented to the Court at the hearing of this Motion.

2 DATED: February 9, 2018

THE LAW OFFICES OF STEPHEN M. HARRIS, P.C.

3  
4  
5 By: /s/ Stephen M. Harris  
6 Stephen M. Harris  
7 Attorneys for Plaintiff Kieva Myers  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## TABLE OF CONTENTS

I. INTRODUCTION .....	3
II. FACTS AND PROCEDURE .....	4
A. The Comfort Access Defect .....	4
B. Named Plaintiff's Lease and Purchase of a Class Vehicle with Comfort Access Defect .....	4
C. Myers Experienced The Comfort Access Defect .....	4
D. Myers and Class Members Were Not Aware of The Defect .....	5
E. BMW's Knowledge of The Defect .....	6
F. BMW Refuses to Rectify The Problem .....	7
G. Claimed Losses .....	7
H. The Class Action Complaint Against BMW .....	7
I. Investigation And Discovery .....	8
J. The Settlement Agreement .....	8
K. The Proposed Settlement .....	9
1. The Proposed Settlement Class .....	9
2. The Proposed Payment and Reimbursement Schedule .....	10
3. The Proposed Owners' Manual Insert .....	10
4. The Proposed Notice to the Class and Others of the Settlement .....	10
5. The Proposed Release of the Class .....	11
6. Attorneys' Fees, Costs and Enhancements .....	11
III. ARGUMENT .....	11
A. The Proposed Class Action Settlement Should Receive Preliminary Approval .....	11
1. Overview of the Class Action Settlement Process and the Role of Preliminary Approval .....	11
2. The Proposed Settlement Is Well Within the Range of Reasonableness Warranting Preliminary Approval and Justified in Light of the Risks of Continued Litigation .....	13
B. Conditional Class Certification Is Appropriate for Settlement Purposes .....	15



1	1.	The Proposed Class Meets the Requirements of Rule 23 .....	15
2	2.	The Proposed Class Is Sufficiently Numerous and Ascertainable .....	15
3	3.	There are Questions of Law and Fact that Are Common to the Class .....	15
4	4.	Plaintiff's Claims are Typical of the Proposed Settlement Class.....	16
5	5.	Plaintiff and Plaintiff's Counsel Will Adequately Represent the Interests of the Proposed Settlement Class .....	17
6	6.	Common Issues Predominate Over Individual Issues.....	18
7	7.	Class Settlement Is Superior to Other Available Means of Resolution.....	19
8			
9	C.	The Proposed Notice Plan Meets the Requirements of Rule 23 .....	20
10	IV.	CONCLUSION .....	21
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

## TABLE OF AUTHORITIES

### CASES

1		
2		
3		
4	<i>Acosta v. Trans Union</i> , 243 F.R.D. 377 (C.D. Cal. 2007) .....	12,14
5	<i>Amchem Prods. v. Windsor</i> , 521 U.S. 591 (1997) .....	15
6	<i>Armstrong v. Davis</i> , 275 F.3d 849 (9th Cir. 2001).....	17
7	<i>Chamberlan v. Ford Motor Co.</i> , 223 F.R.D. 524 (N.D. Cal. 2004).....	16, 18
8	<i>Consolidated Rail Corp. v. Town of Hyde Park</i> , 47 F.3d 473, 483 (2d Cir. 1995).....	15
9	<i>Daffin v. Ford Motor Co.</i> , 458 F.3d 549 (6th Cir. Ohio 2006).....	16, 18
10	<i>Estrella v. Freedom Fin'l Network</i> , 2010 U.S. Dist. LEXIS 61236 (N.D. Cal. 2010) .....	16
11	<i>Gautreaux v. Pierce</i> , 690 F.2d 616 (7th Cir. 1982) .....	12
12	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9 <sup>th</sup> Cir.1998).....	passim
13	<i>Ikonen v. Hartz Mountain Corp.</i> , 122 F.R.D. 258 (S.D. Cal. 1998) .....	15
14	<i>In re Austrian &amp; German Bank Holocaust Litig.</i> , 80 F. Supp. 2d 164 (S.D.N.Y. 2000).....	13
15	<i>In re First All. Mortg. Co.</i> , 471 F.3d 977 (9th Cir. 2006).....	14
16	<i>In Re General Motors Dex-Cool Cases</i> , No. HG03093843 (Cal. Super Ct. Alameda County 2008) .....	13
17	<i>In re Hyundai and Kia Fuel Economy Litigation</i> (9th Cir., Jan. 23, 2018, No. 15-56014) 2018 WL 505343 .....	14,19
18	<i>In re Initial Pub. Offering Sec. Litig.</i> , 226 F.R.D. 186 (S.D.N.Y. 2005).....	12
19	<i>Lozano v. AT&amp;T Wireless Services, Inc.</i> , 504 F.3d 718 (9th Cir. 2007) .....	16
20	<i>Mazza v. American Honda Motor Co.</i> , 666 F.3d 581 (9th Cir. 2012) .....	14, 16, 18
21	<i>Parkinson v. Hyundai Motor Am.</i> , 258 F.R.D. 580 (C.D. Cal. 2008).....	16
22	<i>Rodriguez v. Hayes</i> , 591 F.3d 1105 (9th Cir. 2010).....	16
23	<i>Swanson v. American Consumer Industries</i> , 415 F.2d 1326 (7th Cir. 1969).....	15
24	<i>Tait v. BSH Home Appliances Corp.</i> , 2012 WL 6699247 (C.D. Cal. Dec. 20, 2012) .....	18
25	<i>Torres v. Mercer Canyons Inc.</i> , 835 F.3d 1125 (9th Cir. 2016) .....	14, 19
26	<i>Vasquez v. Coast Valley Roofing, Inc.</i> , 670 F. Supp. 2d 1114 (E.D. Cal. 2009) .....	15
27	<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).....	14
28		

1 *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168 (9th Cir. 2010) ..... 16, 18, 19,20

2 **Statutes**

3 Fed. R. Civ. P. 23 ..... passim

4 **Treatises**

5 4 Newberg & Conte..... 12

6 Manual for Complex Litigation..... 12, 15

# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

### INTRODUCTION

Myers belongs to a putative nationwide class of current and former owners and lessees of certain BMW of North America, LLC ("BMW") X5 vehicles, with a production date from October of 2006 through June of 2013, which were distributed by BMW and equipped with the optional Comfort Access System. The total number of Class Vehicles (nationwide) is 219,233. Myers allege that defects in the design, manufacture, and assembly of the comfort access system in the class vehicles resulted in unintended locking of the Class Vehicles in situations where Class Members did not intend to lock the Vehicle using the key fob or Comfort Access System. (Docket, "Dkt." No. 36, Second Amended Complaint, ¶¶ 11-16).

Plaintiff and BMW have reached a settlement of nationwide class claims subject to approval by this Court. BMW has agreed to reimburse all class members who have incurred costs in connection with spontaneous or unintended locking of their Class Vehicles. BMW's obligations are based upon the payment and reimbursement provisions of the Agreement, more fully described below and in the Agreement attached as exhibit 1. (See, Exhibit 1 to Harris Declaration). BMW is also providing an owner's manual insert that reminds vehicle owners, among other things, to always carry the vehicles' key fob on their person, to avoid a potential lockout situation.

Plaintiff and her counsel believe the Settlement is fair and reasonable, providing class members' similar if not superior remedies than they could otherwise have expected to receive if the case had been successfully tried, but without the delay and risks associated with trial.

Plaintiff respectfully requests that this Court review the negotiated Agreement, attached as Exhibit 1 to the accompanying Harris Declaration, and enter an order: (1) granting preliminary approval of the Settlement; (2); permitting the filing of the Third Amended Complaint, attached as exhibit 5 to the Harris Declaration; (3) certifying a class for settlement purposes and appointing Plaintiff as class representative and Plaintiff's counsel as class counsel; (4) approving the parties' proposed form and method of giving class members notice of the action and proposed Settlement;



(5) directing that notice be given to class members in the proposed form and manner; and (5) setting a hearing on whether the Court should grant final approval of the Settlement, enter judgment, award attorneys' fees and expenses to Plaintiff's counsel, and grant incentive awards to Plaintiff.

## II.

### FACTS AND PROCEDURE

#### A. *The Comfort Access Defect*

Plaintiff contends that the comfort access feature is defective. The defect is that sometimes while the remote control is located inside the Class Vehicle, the vehicle spontaneously locks (Comfort Access Defect). Plaintiff contends that this defect has been reported by numerous owners and lessees of Class Vehicles, sometimes trapping children inside the vehicles. (Second Amended Complaint, "SAC", ¶ 13.) BMW was aware of the Comfort Access Defect, as far back as 2007. (*Id.* ¶¶ 15-16.)

#### B. *Named Plaintiff's Lease and Purchase of a Class Vehicle with Comfort Access Defect*

Myers purchased a used 2013 model year BMW X5 vehicle bearing VIN 5UXZW0C50D0B95201. (SAC ¶ 2.) Myers purchased the Class Vehicle in August of 2015. (*Id.*) Myers' vehicle came equipped with the Comfort Access Feature, which is described by BMW's owner's manual: "the concept [of the feature, is that] the vehicle can be accessed without activating the remote control. All you need to do is to have the remote control with you, e.g., in your pocket. The [Class] Vehicle automatically detects the remote control when it is nearby or in the passenger compartment." (*Id.* ¶ 12.) The owner's manual also states that "[in order] to lock the vehicle, the remote control must be located outside of the vehicle." (*Id.*) Further, the manual states: "If a remote control is detected within the vehicle, the vehicle does not lock or is unlocked again." (*Id.*) (SAC, ¶¶ 21-22.)

#### C. *Myers Experienced The Comfort Access Defect*

On October 19, 2015, Myers experienced the Comfort Access Defect. Myers opened the rear door of the vehicle, placed her child inside of the vehicle, placed the remote inside the

1 vehicle, and shut the rear door of the vehicle. Next, Myers walked around to the driver's door, and  
2 attempted to open the driver's door. Prior to Myers getting to the driver's door, the vehicle locked,  
3 locking her out of the vehicle and locking her very young child inside the vehicle. Myers' child  
4 was too young to know how to open the door to the vehicle, and was trapped inside. (*Id.* ¶ 17.) To  
5 rescue Myers' child, it was necessary to break one of Myers' windows, doing damage to the  
6 vehicle and terrifying Myers's child. Myers had to pay a total of \$192.25 to Best Service Auto  
7 Glass to repair the window that was broken to rescue her child. Additionally, the vehicle suffered  
8 other damage during the ordeal. (*Id.*, ¶ 18.)

9       Following Myers' experiencing the Comfort Access Defect, a complaint was made by the  
10 Myers family to BMW regarding the October 19, 2015 occurrence. In response to this complaint,  
11 on November 4, 2015, Jay Hanson of BMW wrote an email to the Myers family. An excerpt of  
12 Mr. Hanson's email read as follows, "Therefore we must be dealing either with a malfunction of  
13 the locking system or an inadvertent activation of the locking system via either the remote  
14 transmitter or the Comfort Access System. Again, it is not impossible to lock a key in the vehicle  
15 – and to do so is not necessary indicative of a malfunction. For example, if a door other than the  
16 driver's door is open and the locking button on the transmitter is pressed, the vehicle will lock  
17 when the open door is closed. If the user is unaware of having pressed the locking button, then it  
18 would certainly appear that it had somehow locked itself." Plaintiff contends that Mr. Hanson's  
19 email completely contradicts the BMW owner's manual. (*Id.* ¶ 21.)

20 ***D. Myers and Class Members Were Not Aware of The Defect***

21       Prior to Myers' used Vehicle purchase, in August of 2015, Myers' husband performed very  
22 thorough research about the Myers Vehicle. The research included review of BMW's web-site  
23 regarding the Vehicle, and such third-party web-sites as, for example, Edmunds and Car and  
24 Driver. This research included research into the Comfort Access Feature, some review of the  
25 owners' manual, and review of BMW Brochures and other sales pitches regarding the Comfort  
26 Access Feature. Myers' husband discussed the research with her in detail. Despite the research,  
27 Myers was not aware of the fact that the Vehicle could spontaneously lock with the key inside the  
28 vehicle. There was no disclosure in all the materials reviewed by Myers's husband, which were



1 discussed with Myers, about the vehicle spontaneously locking. (*Id.*, ¶ 3.)

2 Based on the research which was performed regarding the Myers Vehicle, Myers would  
3 have been aware of a disclosure about the propensity of the vehicle to spontaneously lock while  
4 the key was inside the vehicle, if any such disclosure had been made. (*Id.*)

5 ***E. BMW's Knowledge of The Defect***

6 Plaintiff contends that BMW knew that the Class Vehicles were defective and not fit for  
7 their intended purpose of providing consumers with safe and reliable transportation. Nevertheless,  
8 BMW actively concealed and failed to disclose this defect to Myers and the Class Members at the  
9 time of purchase or lease and thereafter. (*Id.* ¶ 28.) Only BMW had access to information about  
10 the significant risks associated with the Comfort Access Defect, through BMW's dealerships, pre-  
11 release testing data, warranty data, customer complaint data, replacement part sales data, and  
12 training manuals, among other internal sources of aggregate information about the problem. (*Id.* ¶  
13 32.)

14 During discovery, BMW produced documents substantiating that it was aware that it was  
15 possible for the vehicle doors to be locked even though the key with the Comfort Access function  
16 was inside the vehicle. In simplistic terms, BMW's analysis shows that the Comfort Access  
17 functions with a microsecond delay during which the vehicles' doors can be unlocked and  
18 immediately relocked if the customer's hand remains on the door handle's Comfort Access sensor.  
19 This may result in a key fob placed inside the vehicle not being detected. In such circumstances,  
20 the consumer could put the key in the vehicle (or their coat or purse containing the key) and then  
21 shut the door after the door has been unlocked and relocked, thereby being locked out of the  
22 vehicle. (Declaration of Stephen M. Harris ("Harris Declaration", ¶¶ 8-9.)

23 Plaintiff contends that the parent company of BMW (BMW AG) recommended advising  
24 consumers that they should keep the drivers' door open while opening or closing the passenger or  
25 rear doors, or keep the remote out of the vehicle while loading it. BMW produced an internal  
26 communication to dealers about this issue, but the problem was not disclosed to customers  
27 generally. The only recommendation to dealers was to discuss the issue with consumers who had  
28 already experienced the problem. Moreover, BMW's publicly available advice to consumers was

1 that the vehicle cannot lock while the key with comfort access was inside the vehicle. (*Id.*)

2 ***F. BMW Refuses to Rectify The Problem***

3 BMW has been advised of the damages sustained as a result of the Myers Vehicle  
4 experiencing the Comfort Access Defect, however, BMW has failed to unconditionally reimburse  
5 Myers for all of the damages that have resulted from the Comfort Access Defect. (Second  
6 Amended Complaint, ¶ 26.) Plaintiff understands that other consumers were similarly advised by  
7 BMW that it was not responsible for the vehicle locking as a result of the Comfort Access Defect.  
8 (*Id.*, ¶ 33, c.)

9 ***G. Claimed Losses***

10 Because of BMW's misconduct, Myers and the other owners and lessees of Class Vehicles  
11 have been harmed and have suffered actual damages. The actual damages include, but are not  
12 limited to, the Class Vehicles continuing to experience the Comfort Access Defect, and that Class  
13 Members have suffered unreimbursed out of pocket expenses because of the Comfort Access  
14 Defect. (*Id.* ¶ 27.)

15 ***H. The Class Action Complaint Against BMW***

16 On January 24, 2016, Myers brought a class action against BMW on behalf herself and a  
17 class of California consumers alleging (1) violations of California Consumer Legal Remedies Act,  
18 (2) violations of California Unfair Business Practices Act, (3) breach of implied warranty, and (4)  
19 fraud. (Dkt. No. 1.) Myers then filed a first amended complaint in April of 2016, containing the  
20 same theories of recovery. (Dkt. No. 2.) After the filing of the First Amended Complaint, BMW  
21 brought a motion to dismiss, which was opposed by Myers. The court granted the motion, with  
22 leave to amend. (Dkt. No's. 23, 31-33, 35.)

23 Myers then filed a Second Amended Complaint, in October of 2016. (Dkt. No. 36.) BMW  
24 again brought a motion to dismiss, which was opposed by Myers. (Dkt. No.'s 37, 38, and 39.) The  
25 court granted the motion in part, dismissing the common law fraud claim. But the court denied the  
26 motion to dismiss the UCL and CLRA claims. (Dkt. No. 40.) BMW filed its answer to the  
27 operative complaint in January of 2017. (Dkt. No. 41.)



**I. Investigation And Discovery**

Plaintiff conducted a pre-filing and post-filing investigation, including, but not limited to, retaining an expert consultant regarding the Comfort Access Defect, review of publicly available information relating to the nature and extent of the Comfort Access Defect, review of on-line complaints and NHTSA complaints, review of lawsuits filed in Southern California relating to this problem, review of literature about the dangers posed to children locked in parked cars, and obtaining and reviewing approximately 3,500 pages of documents produced by BMW in response to Plaintiff's formal discovery requests, including warranty and good will claims data, call center records, and customer complaint records. The investigation and discovery revealed other instances of consumers locking their keys inside class vehicles, other complaints relating to children being unintentionally locked inside class vehicles, a complaint by a parent being cut by class when the vehicle window was smashed to rescue a child, and other medical reports about children being lethargic as a result of being locked inside class vehicles. (Harris Declaration, ¶¶ 11-12.)

Plaintiff further propounded written discovery, and received written responses thereto. Plaintiff's counsel also travelled to New Jersey and conducted four depositions of BMW witnesses over several days, with the witnesses produced in response to Plaintiff's person most knowledgeable deposition notice. (*Id.*, ¶ 12.)

**J. The Settlement Agreement**

The parties had discussed resolution of the case early in the litigation, but could not agree on the terms of a comprehensive class action settlement. After the depositions of BMW's witnesses in New Jersey, the parties renewed their discussions and were able to reach a resolution of all issues. The parties first agreed on all aspects of the settlement (other than attorneys' fees, costs, and enhancement) including agreement to a nationwide class for settlement purposes only. Subsequently, the parties negotiated the attorneys' fees, costs, and the enhancement amount. A formal Settlement Agreement was then prepared and executed by all parties in December of 2017. (*Id.*, ¶¶ 13-14.) Thereafter, the parties negotiated the notice and claim form. (*Id.* at ¶ 14.)

As part of the settlement, Plaintiff submits a proposed Third Amended Complaint, to be filed consistent with the settlement, and asserting claims on a nationwide basis. (*Id.*, ¶ 15, and

Exhibit 5, attached thereto.) The parties agree that because the Third Amended Complaint is being submitted to conform the complaint to the Settlement, BMW need not file a response to the Third Amended Complaint at this time, pending approval of the Settlement.

The court granted several extensions of time for Plaintiff to file a class certification motion, and thereafter this motion for preliminary approval, while the parties continued with their negotiations. (See, Dkt. No.'s 46-53.) Ultimately, the court granted the stipulation of the parties to have the motion filed on the present date. (See, Dkt. No.'s 52-53.)

### ***K. The Proposed Settlement***

#### **1. The Proposed Settlement Class**

The settlement class consists of “all residents in the United States (including Puerto Rico), who currently own or lease or previously owned or leased, a Class Vehicle” (“Settlement Class”). (Agreement, § I, ¶ 10.) Excluded from the Settlement Class are the following: “(1) BMW NA, its related entities, parent companies, subsidiaries and affiliates, and their respective officers, directors, and employees; (2) insurers of the Class Vehicles; (3) all persons and/or entities claiming to be subrogated to the rights of Class Members; (4) issuers or providers of extended vehicle warranties or extended service contracts; (5) individuals and/or entities who validly and timely opt-out of the Settlement; (6) consumers or businesses that have purchased Class Vehicles previously deemed a total loss (i.e. salvage) (subject to verification through Carfax or other means); (7) current and former owners of a Class Vehicle who previously have released their claims against BMW NA with respect to the issues raised in the Litigation; (8) United States and Puerto Rico residents who have purchased Class Vehicles in the United States but have since transported the vehicle outside the United States for permanent use abroad; (9) any current or former owner or lessee of a Class Vehicle that has received or obtained a goodwill or warranty payment for Out-Of-Pocket costs(s) (unless the consumer had to pay or share in some portion of the Out-Of-Pocket Cost, in which case the unreimbursed portion of such cost is not excluded); (10) any judge to whom this matter is assigned, and his or her immediate family (spouse, domestic partner, or children); (11) individual or entities that have purchased and/or leased Class Vehicles as “fleet” vehicles (i.e. rentals or company vehicles); and (12) Class Vehicles that were involved



1 in accidents that resulted in damage to the Comfort Access System or related components.” (*Id.*)

## 2 **2. The Proposed Payment and Reimbursement Schedule**

3 BMW’s agrees to pay for “emergency out of pocket costs”, meaning costs incurred in  
4 connection with a Spontaneous or Unintended Locking in which a child and/or pet was locked  
5 inside a Class Vehicle, up to a maximum of \$650.00, consisting of \$150 maximum reimbursement  
6 for “non-emergency” out of pocket costs, and up to \$500 for “emergency out of pocket costs.” In  
7 Spontaneous or Unintended Lockout situations, BMW agrees to pay for “non-emergency” out of  
8 pocket costs, up to a maximum reimbursement limit of \$150.00. (Agreement, § I, ¶¶ 21, 26, 27  
9 and § III.)

10 Emergency out of pocket costs include the costs to repair a broken window, or other  
11 damage, arising out of the effort to unlock a Class Vehicle, as well as other related costs such as  
12 towing, or rental vehicle costs. (*Id.*, § I, ¶¶ 21, 26, and 27.) And non-emergency costs include  
13 obtaining the cost of a locksmith or other similar services, as well as towing and rental costs. (*Id.*;  
14 Harris Declaration, ¶ 10.)

## 15 **3. The Proposed Owners’ Manual Insert**

16 The Settlement requires that the Class Notice include an owner’s manual insert (Exhibit 4)  
17 that provides additional information and warnings regarding patenting locking of Class Vehicle  
18 doors using the Comfort Access System. This is a vital part of the Settlement, notifying Class  
19 Members of the lock-out concern order to avert potential harm to children and other vulnerable  
20 individuals. (*Id.*, § I, ¶ 31, § III, A; Harris Declaration, ¶18, and Exhibit 4.)

## 22 **4. The Proposed Notice to the Class and Others of the Settlement**

23 A Settlement Administrator is to be appointed under the Agreement who will disseminate  
24 notice of the Settlement (and an Owners’ Manual Insert) and the hearing on a Final Approval  
25 Motion (see, Exhibits 2, 4 of the Harris Declaration; Agreement §I, ¶¶ 14, 28, 31; § V). Notice will  
26 be sent by First-Class U.S. Mail, postage paid, to potential Settlement Class members, including  
27 current and prior owners and lessees of Class Vehicles. The procedure for giving notice to  
28 potential Settlement Class members is set forth in Section I, Paragraph 28 and Section IV,

1 paragraphs A-E, of the Agreement. In addition to mail notice, the settlement administrator will  
 2 maintain a toll free number and web site dedicated to advising Class Members about the  
 3 Settlement. (*Id.*)

4 Class members will have 90 days to submit a claim from the date of transmission of the  
 5 notice, and can do so via mail, email, or facsimile. (Agreement, § I, ¶¶ 9, 28; §§ IV-V; Ex.'s 2-4 to  
 6 Harris Declaration.) Class members can also appeal denial of their claims, or cure deficient claims.  
 7 (Agreement, § V, ¶¶ D, F-G.)

8 The Settlement Agreement, at Section VI, establishes the procedure for those potential  
 9 Settlement Class members who wish to be excluded from the settlement; Section VII establishes  
 10 the procedure for those potential Settlement Class members who wish to object to the settlement.

#### 11 **5. The Proposed Release of the Class**

12 Class Members who do not opt out of the Settlement according to the procedures set forth  
 13 in the Settlement Agreement shall release any and all claims (including unknown claims) or causes  
 14 of action that were, or could have been, asserted by Plaintiff or any Class Members against BMW,  
 15 regarding spontaneous or inadvertent locking of the doors due to the Comfort Access System in  
 16 Class Vehicles as alleged in the Action (excluding potential claims for personal injury, or claims  
 17 for subrogation). (Agreement, § VIII.)

#### 18 **6. Attorneys' Fees, Costs and Enhancements**

19 The Agreement contains provisions relating to class counsel's attorneys' fees and costs, as  
 20 well as the recommended enhancement payment. (*Id.*, § IX.)

### 21 **III.**

### 22 **ARGUMENT**

#### 23 **A. The Proposed Class Action Settlement Should Receive Preliminary Approval**

##### 24 **1. Overview of the Class Action Settlement Process and the Role of Preliminary** 25 **Approval**

26 A class action settlement like the one proposed here must be approved by the Court to be  
 27 effective. *See* Fed. R. Civ. Proc. 23(e). Court approval occurs in three steps: (1) a preliminary  
 28 approval hearing, at which the court considers whether the proposed settlement is within the range



1 of reasonableness meriting final approval; (2) a notice and comment stage, during which class  
2 members are informed about the proposed settlement and given an opportunity to object; and (3) a  
3 “formal fairness hearing,” or final approval hearing, at which the court decides whether the  
4 proposed settlement should be approved as fair, adequate, and reasonable to the class. (*See*  
5 *Manual for Complex Litigation* (Fourth) §§ 21.632-34 (2004).)

6       Whereas at the final approval stage the Court must decide whether the parties negotiated a  
7 settlement that is fair, reasonable, and adequate to class members, at the preliminary approval  
8 stage, the Court need only decide whether the settlement falls within a range of reasonableness  
9 possibly meriting final approval (i.e., whether it would be worthwhile to give the class notice of  
10 the settlement and proceed with a formal fairness hearing). (*See Gautreaux v. Pierce*, 690 F.2d  
11 616, 621 n.3 (7th Cir. 1982); *Acosta v. Trans Union*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (“To  
12 determine whether preliminary approval is appropriate, the settlement need only be potentially  
13 fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval,  
14 after such time as any party has had a chance to object and/or opt out.”); 4 Newberg & Conte, §  
15 11.25.) If the settlement has no obvious deficiencies, then it falls within the range of possible  
16 approval. (*See In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005).) In  
17 other words, the Court makes only a preliminary determination of the settlement’s fairness,  
18 reasonableness, and adequacy, pointing out any settlement terms that are so unacceptable at the  
19 outset that a formal fairness hearing would be a waste of time. (*See Manual for Complex*  
20 *Litigation*, § 21.632; 4 Newberg & Conte, § 11.25.)

21       Plaintiff asks the Court to take the first step in the settlement approval process and grant  
22 preliminary approval of the Settlement. Plaintiff further requests that the Court provisionally  
23 certify the Settlement Class, appoint Plaintiff as Class Representative and her attorneys as Class  
24 Counsel, order dissemination of notice to Class Members, and set a date for the final approval  
25 hearing.

1           **2.       The Proposed Settlement Is Well Within the Range of Reasonableness**  
 2                   **Warranting Preliminary Approval and Justified in Light of the Risks of**  
 3                   **Continued Litigation**

4           The settlement presented by the parties contains no obvious deficiencies and does not  
 5 provide for excessive attorneys' fees at the expense of the class. Indeed, as its terms were  
 6 negotiated at arm's length by experienced counsel<sup>1</sup> knowledgeable in complex class litigation, the  
 7 settlement enjoys a presumption of fairness. (*See, e.g., In re Austrian & German Bank Holocaust*  
 8 *Litig.*, 80 F. Supp. 2d 164, 173-174 (S.D.N.Y. 2000). "Once the Settlement is presumed fair, it is  
 9 not for the Court to substitute its judgment as to a proper settlement for that of such competent  
 10 counsel." *Id.* (internal quotes omitted).)

11           An objective evaluation confirms that the benefits negotiated for the class are well within  
 12 the range of reasonableness. It follows that the class is now receiving, through a settlement, nearly  
 13 as much as could reasonably be expected after a successful trial verdict. The alternative would be  
 14 protracted litigation that would leave class members uncompensated, and many completely  
 15 unaware that their vehicles suffer from a Comfort Access Defect, a problem which poses a risk to  
 16 children or pets of being locked in the vehicle and potentially suffering serious injury or death.

17           If the parties had been unable to resolve this case through settlement, the litigation could  
 18 have been even more expensive and lengthy. For instance, in a case against General Motors  
 19 alleging a defect in an intake manifold gasket, another plaintiffs' counsel devoted more than  
 20 58,000 hours over five years before resolving the cases for cash reimbursements through a claims-  
 21 made process. (*In Re General Motors Dex-Cool Cases*, No. HG03093843 (Cal. Super Ct.  
 22 Alameda County 2008).)

23           The reality is that any case against a major automotive manufacturer alleging a defect in  
 24 thousands of vehicles has the potential to take up significant amounts of the Court's and the  
 25 parties' resources. In addition, if the case were to proceed, Plaintiff would need to retain multiple

26 \_\_\_\_\_  
 27 <sup>1</sup> See, Harris Declaration, ¶¶ 17-20.



1 experts resulting in significant additional expenses.

2 It goes without saying that BMW would strongly oppose class certification were the case  
3 to proceed on the merits. “The value of a class action ‘depends largely on the certification of the  
4 class,’ and . . . class certification undeniably represents a serious risk for plaintiffs in any class  
5 action lawsuit.” (*Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 392 (C.D. Cal. 2007) (quoting *In*  
6 *re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 817 (3d. Cir. 1995).) As  
7 explained herein, Plaintiff’s counsel believe that this case is appropriate for class certification in  
8 the litigation context. However, there is always a risk that a Court would not find this action  
9 suitable for certification as a nationwide class or a multi-state class, or, even if class certification  
10 were granted in the litigation context, class certification can always be reviewed or modified  
11 before trial, and a class may be decertified at any time. (See, e.g., *Mazza v. American Honda*  
12 *Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (the Ninth Circuit reversed the certification of a  
13 nationwide class composed of consumers seeking relief under California’s consumer protection  
14 laws); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).)

15 Moreover, *Mazza* is distinguishable where, as here, the class suffers from an “informational  
16 injury,” meaning “a common policy of non-disclosure” by the defendant. (*Torres v. Mercer*  
17 *Canyons Inc.*, 835 F.3d 1125, 1134-1135 (9th Cir. 2016).) The outcome in *Mazza* was due to the  
18 defendant having “subjected only a small segment of an expansive class of car buyers to  
19 misleading material as part of a ‘very limited’ advertising campaign.” (*Id.* at 1137 (quoting *Mazza*,  
20 666 F.3d at 595).) But where there exists “a common failure to disclose information, and not  
21 merely a disparate series of affirmative statements,” predominance is easily established. (*Id.* at  
22 1137–38; accord *In re First All. Mortg. Co.*, 471 F.3d 977, 985, 990–91 (9th Cir. 2006) (affirming  
23 consumer class certification under California law based on defendants’ omissions and  
24 misrepresentations communicated through various loan officers).<sup>2</sup>)

25  
26  
27 <sup>2</sup> This analysis also serves to distinguish the recent decision of *In re Hyundai and Kia Fuel*  
28 *Economy Litigation* (9th Cir., Jan. 23, 2018, No. 15-56014) 2018 WL 505343.

Given the favorable terms of the settlement and the manner in which these terms were negotiated, the proposed settlement should be viewed, at least preliminarily, as a fair, reasonable, and adequate compromise of the issues in dispute. It is worthwhile for the Court to grant preliminary approval to the settlement, order dissemination of notice to the class for comment, and proceed to a formal fairness hearing.

**B. Conditional Class Certification Is Appropriate for Settlement Purposes**

**1. The Proposed Class Meets the Requirements of Rule 23**

Before granting preliminary approval of the Settlement, the Court should determine that the proposed settlement class meets the requirements of Rule 23. (*See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); Manual for Complex Litigation, § 21.632.) An analysis of the requirements of Rule 23(a) and 23(b)(3), commonly referred to as numerosity, commonality, typicality, adequacy, predominance, and superiority, shows that certification of this proposed settlement class is appropriate.

**2. The Proposed Class Is Sufficiently Numerous and Ascertainable**

The numerosity requirement is met where “the class is so numerous that joinder of all members is impracticable.” (Fed. R. Civ. P. 23(a) (1).) Generally, courts will find a class sufficiently numerous if it consists of 40 or more members. (*Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009) (numerosity is presumed at a level of 40 members); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (“numerosity is presumed at a level of 40 members”); *Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th Cir. 1969) (numerosity satisfied with class of 40 individuals); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1998) (finding a purported class of 40 members sufficient to satisfy numerosity).)

Here, the proposed settlement class consists of all 219,233 current and former owners and lessees of Class Vehicles within the United States (including Puerto Rico).

**3. There are Questions of Law and Fact that Are Common to the Class**

The second Rule 23(a) requirement is commonality, which is satisfied “if there are questions of law or fact common to the class.” (Fed. R. Civ. P. 23(a) (2).) The “commonality



1 requirement has been ‘construed permissively,’ and its requirements deemed minimal.’” (*Estrella*  
 2 *v. Freedom Fin'l Network*, 2010 U.S. Dist. LEXIS 61236 (N.D. Cal. 2010) (quoting *Hanlon v.*  
 3 *Chrysler Corp.*, 150 F.3d 1011, 1019-1020 (9th Cir. 1998).) Moreover, “‘there is clear  
 4 justification for handling the dispute on a representative rather than an individual basis’ if  
 5 ‘common questions present a significant aspect of the case and they can be resolved for all  
 6 members of the class in a single adjudication....’” (*Mazza*, 666 F.3d at 589 (quoting *Hanlon*, 150  
 7 F.3d at 1022).)

8 Here, each Class Member purchased or leased class vehicles. BMW concedes that it is  
 9 possible for the key in a vehicle with Comfort Access to be locked inside the Class Vehicles. It  
 10 follows that the principal common questions of law and fact which a trier of fact would need to  
 11 resolve are whether the Comfort Access System is defective, and if so, whether BMW had an  
 12 obligation to apprise consumers of the defect and make repairs relating to the defect at no cost to  
 13 the consumer. The need to determine whether an inherent defect exists not only satisfies Rule 23’s  
 14 commonality requirement, it raises the very type of overarching common question that has driven  
 15 class certifications in other automotive defect cases. (*See*, e.g., *Hanlon*, 150 F.3d at 1020  
 16 (allegedly defective rear liftgate latches); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 595-  
 17 97 (C.D. Cal. 2008) (allegedly defective flywheels); *Chamberlan v. Ford Motor Co.*, 223 F.R.D.  
 18 524, 526 (N.D. Cal. 2004) (allegedly defective engine intake manifolds); *Daffin v. Ford Motor*  
 19 *Co.*, 458 F.3d 549, 552 (6th Cir. Ohio 2006) (allegedly defective throttle body assembly); *see also*  
 20 *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1172 (9th Cir. 2010) (reversing denial of  
 21 class certification in a case regarding allegedly defective tire alignment).)

#### 22 **4. Plaintiff’s Claims are Typical of the Proposed Settlement Class**

23 “Like the commonality requirement, the typicality requirement is ‘permissive’ and requires  
 24 only that the representative’s claims are ‘reasonably co-extensive with those of absent class  
 25 members; they need not be substantially identical.’” (*Rodriguez v. Hayes*, 591 F.3d 1105, 1124  
 26 (9th Cir. 2010) (quoting *Hanlon*, 150 F. 3d at 1020).) “In determining whether typicality is met,  
 27 the focus should be on the defendants’ conduct and plaintiff’s legal theory, not the injury caused to  
 28 the plaintiff.” (*Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007).) Thus,

1 typicality is “satisfied when each class member’s claim arises from the same course of events, and  
2 each class member makes similar legal arguments to prove the defendant’s liability.” (*Armstrong*  
3 *v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol v. Giuliani*, 126 F.3d 372, 376 (2nd  
4 Cir. 1997)).)

5 Here, Plaintiff asserts that Class Members’ claims arising from the Comfort Access System  
6 are reasonably coextensive with the legal claims asserted by the named Plaintiff. Each Class  
7 Member’s claim arises from the same underlying conduct—namely, BMW’s alleged concealment of  
8 an inherent defect in the Comfort Access System in the 219,233 X-5 Class Vehicles. In addition,  
9 Class Members have similar interests in the remedies being provided by the proposed settlement,  
10 which include an owners’ manual insert warning them of the existence of the defect, and  
11 reimbursements for out of pocket costs incurred in connection with incidents involving  
12 Spontaneous or Unintended Locking.

13 **5. Plaintiff and Plaintiff’s Counsel Will Adequately Represent the Interests of the**  
14 **Proposed Settlement Class**

15 The final Rule 23(a) requirement asks whether “the representative parties will fairly and  
16 adequately protect the interests of the class.” (Fed. R. Civ. P. 23(a) (4).) This requirement is  
17 satisfied if: (1) the proposed representative Plaintiffs do not have conflicts of interest with the  
18 proposed class, and (2) Plaintiffs are represented by qualified and competent counsel. (*Hanlon*,  
19 150 F.3d at 1020.)

20 Here, the proposed representative Plaintiff does not have individual interests in this  
21 litigation that conflict with the best interests of the class. To the contrary, Myers and each Class  
22 Member have a common interest in receiving notice from BMW and obtaining reimbursement  
23 from BMW as a result of its alleged concealment of the Comfort Access Defect. In addition, the  
24 named Plaintiff is represented by counsel well versed in prosecuting automotive class actions, and  
25 other class actions.

26 While the Court usually must speculate to some extent in assessing whether the named  
27 plaintiff and her counsel will adequately represent the class, in this case the Court can look to the  
28 proposed settlement negotiated by Plaintiff and her counsel. The settlement provides fair



1 compensation for Class Members' claims by providing them with reimbursement for repairs to  
 2 their Class Vehicles relating to Spontaneous or Unintended Locking events. And the Settlement  
 3 also warns all class members of the problem, in an effort to prevent future harm or death posed by  
 4 young children or pets being locked inside Class Vehicles.

#### 5 **6. Common Issues Predominate Over Individual Issues**

6 "In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class  
 7 certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b) (1), (2) or  
 8 (3)." (*Hanlon*, 150 F.3d at 1022.) Here, the proposed class is maintainable under Rule 23(b) (3),  
 9 as common questions predominate over any questions affecting only individual members and class  
 10 resolution is superior to other available methods for a fair resolution of the controversy. (*Id.*  
 11 (citing Fed. R. Civ. P. 23(b) (3)).)

12 Each class members' claim depends on whether his/her/its Class Vehicle suffers from an  
 13 inherent Comfort Access Defect, and thus these claims raise just the sort of predominantly  
 14 common questions courts have found to justify class treatment. (*See, e.g., Hanlon*, 150 F.3d at  
 15 1022-1023 (allegedly defective rear lift gate latches); *Chamberlan*, 223 F.R.D. at 526 (allegedly  
 16 defective engine intake manifolds); *Daffin*, 458 F.3d at 552 (allegedly defective throttle body  
 17 assembly).) Moreover, proof of the manifestation of the defect is not a prerequisite to class  
 18 certification. (*Wolin*, 617 F.3d at 1173.)

19 Preliminary approval is not precluded by *Mazza*, where after analyzing governmental  
 20 interests, the court denied certification "[u]nder the facts and circumstances of [the] case," holding  
 21 "that each class member's consumer protection claim should be governed by the consumer  
 22 protection laws of the jurisdiction in which the transaction took place." (*Mazza*, 666 F.3d at 594.)  
 23 In *Mazza*, plaintiffs' claims against a vehicle manufacturer were for false advertising. "Thus,  
 24 *Mazza* stands for the unremarkable proposition that it is difficult to certify a class where the class  
 25 members are not all exposed to the same representations. This proposition has no relevance to [a]  
 26 case, where Plaintiffs' theory is that Defendant's *omissions* violated the [states' consumer statutes]  
 27 and that partial representations *on the product itself* are misleading." (*Tait v. BSH Home*  
 28 *Appliances Corp.*, SA CV 10-0711 DOC, 2012 WL 6699247 (C.D. Cal. Dec. 20, 2012) (Emphasis

in original); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134-1135, 1137-1138 (9th Cir. 2016).<sup>3</sup>) Here too, Plaintiff's theory (set forth in the proposed amended complaint) is that BMW's failure to disclose the existence of the Water Pump Defect violated unfair and deceptive acts and practice laws of each state. In addition, the claims for breaches of express warranty and implied warranty of merchantability are based upon the same facts pertaining to each Class Member. Importantly, with respect to the claims occurring within warranty, Class Members will not need to show that any particular warranty was delivered or made to them by BMW in order to be reimbursed under the Settlement Agreement. They need merely show proof of a covered locking event resulting in out of pocket costs for repair and replacement.

#### **7. Class Settlement Is Superior to Other Available Means of Resolution**

Similarly, there can be little doubt that resolving all Class Members' claims through a single class action is superior to a series of individual lawsuits. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." (*Hanlon*, 150 F.3d at 1023.) Indeed, the terms of the Settlement negotiated on behalf of the class demonstrates the advantages of a collective bargaining and resolution process.

Addressing the allegations of an inherent defect in the design of the Class Vehicles' Comfort Access Systems through a class action is superior to individual litigation or any alternative methods that may exist. This action was filed precisely because Plaintiff believed those alternatives, such as filing complaints with NHTSA or directly with BMW, would have proven ineffective in addressing the problem on a class-wide basis. (See *Wolin*, 617 F.3d at 1175 ("Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis,

---

<sup>3</sup> This analysis also serves to distinguish the recent decision of *In re Hyundai and Kia Fuel Economy Litigation* (9th Cir., Jan. 23, 2018, No. 15-56014) 2018 WL 505343.



this [superiority] factor weighs in favor of class certification.”.) As the Ninth Circuit found in the *Wolin* automotive defect case, “[f]orcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, [would be] an inferior method of adjudication.” (*Id.* at 1176.) “There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery.” (*Hanlon*, 150 F.3d at 1023.) The superiority of proceeding through the class action mechanism, on the other hand, is demonstrable. By aggregating Class Members’ claims, Plaintiff’s counsel have been able to expend the resources necessary to conduct discovery of the alleged Comfort Access Defect and negotiate a settlement with BMW that, if approved, will provide Class Members with reimbursements for their repair costs, and clear notice of the problem, which will have an incalculable benefit of ensuring that future deaths or harm are avoided. As the class action device provides the superior means to effectively and efficiently resolve this controversy, and as the other requirements of Rule 23 are each satisfied, certification of the settlement class proposed by the parties is appropriate.

***C. The Proposed Notice Plan Meets the Requirements of Rule 23***

Upon certifying a 23(b)(3) class, Rule 23(c)(2)(B) requires the Court to “direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” In addition, Rule 23(e) (1) requires that before a proposed settlement may be approved, the Court “must direct notice in a reasonable manner to all class members who would be bound by the proposal.”

The parties have agreed on a notice plan that satisfies the requirements of Rule 23. Under this plan, BMW will cause to be mailed notice of class certification and the proposed settlement to all current and former owners and lessees of class vehicles who can be reasonably identified.<sup>4</sup> The form of the notice to be mailed, attached as Exhibit 2 to the Harris Declaration, includes all the

---

<sup>4</sup> Moreover, the Agreement also provides for a web site and toll free number to be maintained in order to notify the Class Members about the Settlement, and to answer questions that they may have.

1 content required by Rule 23(c) (2) (B), such as a description of the action and class claims, as well  
2 as the Class Members' right to opt out or object to the proposed settlement, including any  
3 application for attorneys' fees, costs and service awards.

4 **IV. CONCLUSION**

5 The Parties have negotiated a fair and reasonable settlement that almost certainly never  
6 would have been arrived at but for the use of a class action as a procedural device, a dedicated and  
7 informed Class Representative and experienced Plaintiff's counsel. Preliminary Approval should  
8 thus be granted.

9  
10 DATED: February 9, 2018

THE LAW OFFICES OF STEPHEN M. HARRIS, P.C.

11  
12 By: /s/ Stephen M. Harris  
13 Stephen M. Harris  
14 Attorneys for Plaintiff Kieva Myers  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28